NO. 4412

United States
Circuit Court of Appeals
For the Ninth Circuit

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the United States District Court of the District of Arizona

THORWALD LARSON,
County Attorney.

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Plaintiff in Error.

Filed....., 1925.

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Clerk.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NAVAJO COUNTY, PLAINTIFF IN ERROR, -v- LOUIS F. MESMER, an individual, doing business under the firm name and style of MESMER & RICE, DEFENDANT IN ERROR.	NO. 4412

PETITION FOR REHEARING

Come now the appellant in the above entitled action, and respectfully moves for a rehearing herein upon the following grounds:

THE COURT FAILED TO CONSIDER THE INSUFFICIENCY OF THE COMPLAINT UPON THE QUESTION OF ULTRA VIRES.

It is evident from a reading of the opinion rendered by this Court on April 6, affirming the judgment below, that the most important point presented by appellant upon the oral argument, that of ultra vires, has inadvertently been omitted from the points considered. Perhaps this is due to the

failure of appellant's counsel to present the point as vigorously or as capably as its importance demanded. At any rate, the point so presented, to-wit: that the contract for extras, as pleaded in plaintiff's complaint, and which is the sole basis of the action, was **ultra vires.** This point was treated to some extent on pages 92 and following of our brief, but it could doubtless have been more forcefully presented, and doubtless ought to have been. It goes to the sufficiency of the pleading, and is expressly set up and relied upon in our Motion for Judgment (Tr. Rec. p. 104, line 5). Even if not included in the motion, it is our understanding that this Court may and should determine the sufficiency of the pleadings.

The complaint shows that "all payments are to be made from the bridge bond fund." (Tr. Rec. p. 71, line 3). It was, therefore, known to plaintiff and by all concerned, that the bridge in question was to be built from the proceeds of bonds issued by the County, and that any material departure from the original plans and specifications must proceed in the statutory way; that is, by a readvertising for bids. Let us see what kind of an agreement the complaint charges the Board of Supervisors to have made, and whether such an agreement could legally have been made.

According to the amended complaint (Tr. Rec. p. 67), the Board of Supervisors, on August 7, 1916, accepted the bid of plaintiff, made in response to

an advertised call (Tr. Rec. 63) to build a certain bridge for $23,800. The contract itself was signed September 5, 1916. Paragraphs IV and V of the Amended Complaint read as follows:

"* * * That on or about the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available for the construction of said bridge the sum of fifteen thousand ($15,000.00) dollars, being a portion of the amount appropriated by the Indian Department of the Federal Government, provided that certain changes should be made in the specifications theretofore by plaintiff submitted, so that said construction should fulfill the requirements of the Indian Service; that said requirements were not at said time known, either to plaintiff or defendant, and for this reason it was agreed and understood between plaintiff and the said C. E. Perkins, and also by the Board of Supervisors of said defendant, that the changes in the construction and specifications which might be required to be made in order to fulfill the requirements of the Indian Service should be paid for as extras at the rates and prices provided for in the addenda both to the specifications and the contract; that from time to time subsequent to the 5th day of December, 1916, and during and including the time up to the completion of said bridge changes so required were made with the knowledge of defendant, acting through its County Engineer and its

Board of Supervisors, and that such changes and alterations consisted of the use of additional material; in the thickness of the steel cylinders, and also in the top and bottom chords and in the lower lateral bracing, all of which necessitated the use of materials and labor as hereinafter in this complaint set forth, and all of which plaintiff alleges it was understood and agreed should be paid for as extras.

"Plaintiff alleges that changes hereinbefore required to be made in the original plans and specifications, which prior to the 9th day of August, 1916, had been submitted by plaintiff and accepted by defendant, were agreed to be made on and subsequent to the 9th day of August, 1916; * * * * * that plaintiff, relying upon the understanding and agreement so had with defendant, both as set forth in said written contract and as understood and agreed between plaintiff and defendant, its officers and agents, on or about the 9th day of August, 1916 completed said bridge in compliance in all respects with its contract and agreement, at an expense to him over and above the original contract price of $23,800.00 of the sum of $13,973.65, which sum plaintiff alleges became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid in the construction of said bridge with superstructure and approaches in a manner so as to comply with the requirements of the Indian Service, and make available to defendant the appropriation by the Federal Government of the sum of $15,000.00; * * * * *"

It is thus plain that the Board, after accepting the bid of plaintiff for a certain bridge at a cer-

tain figure, undertook to contract for a very different bridge, at an increased cost of nearly 60%, and without readvertising or affording any opportunity for competitive bidding. On the face of the complaint itself, this does not present the ordinary arrangement for "extras," which in any case do not amount to an appreciative percentage of the contract price. This was an agreement for practically a new bridge throughout. It is plainly shown in Par. VII (Tr. Rec. 78) that conferences extending over a period of four months after August 9, 1916, were had between the interested parties for the very purpose of determining "what changes and alterations from the original plans and specifications submitted by plaintiff would be necessary to meet the requirements of the Indian Department." This is a frank and unequivocal assertion that a new contract was made. In paragraph IV it is stated that the requirements of the Indian Department were not then known either to plaintiff or defendant. That is to say, the Board was not only contracting for a different bridge than that upon which it had advertised for bids, but was contracting blindly, for anything the Indian Department might require, without bids, competition or authority. This the Board could not and cannot do.

It is a familiar rule that the law relating to a contract is a part of the contract itself.

"The law of the place where the contract is

entered into at the time of the making of the same is as much a part of the contract as though it were expressed or referred to therein."

13 C. J. 560, Par. (523)—3.

The plaintiff was bound to inform himself, and from the foregoing, it is fairly reasonable to suppose that he had informed himself as to the power or lack of power of the Board of Supervisors, after having accepted a bid for a particular type of bridge, to increase the expenditure for said bridge to an amount more than $13,000.00, without competitive bidding. It was the duty of the contractor to inform himself that the statutes of Arizona provide, among other things, that the Board of Supervisors may not purchase materials in excess of $100.00 valuation without advertisement and competitive bidding; that he inform himself of the provisions of Paragraph 2431 of the Civil code of Arizona to this effect:

"The Board must not for any purpose contract debts or liabilities except in pursuance of law or ordinances of its own adopting, in accordance with the powers herein conferred."

"A contractor dealing with a municipal corporation is chargeable with knowledge of the limitations on the power of its agents and officers."

Contra Costa Construction Company vs. Daly City, 192 Pac. 178.

"A person contracting with public officers must take notice of their powers and is charged with a knowledge of the law, and makes a contract in violation of the law at his own risk, and where public officers fail to advertise and contract with the lowest bidder, a contract so made is wholly void and imposes no obligation upon the public body."

Reese vs. Ultra Vires, Paragraph 190

"The plaintiff is chargeable with knowledge that the Fire Commissioners in employing him, had no authority to bind the defendant, and the City cannot be held liable for the services rendered even if beneficial to it."

Douglas vs. Lowell, 194 Mass. 268; 80 N. E. 510;

Higginson vs. Fall River, 226 Mass. 423; ; 115 N. E. 764; 2 A. L. R. 1211;

In the case of City of Chicago vs. Mohr, the contractor Mohr was permitted to alter his bid, such bid having been submitted after due advertisement and submission of bids in competition with other bidders. The Supreme Court of Illionis said:

"It is a clear violation of the law to permit the change in the bid of the Freeman Company as to the matter of time. That it is obvious to allow the change of the bid in any material respect after the bids are opened is a clear violation of the purpose, intent and spirit of the law, and opens the door for preferences and favoritism as between the different bidders, if not to the grossest frauds. When a

bid is permitted to be changed it is no longer the sealed bid submitted in the first instance, and to say the least is favoritism if not a fraud, a direct violation of the law and cannot be too strongly condemned."

In the case of Ely vs. Grand Rapids, 44 N. W. 447, a change in the contract was attempted by the City Council of Grand Rapids after having entered into a contract with one Ely for the construction of a certain amount of paving, by permitting the contractor Ely to perform an additional amount of paving at the same rate as the original contract. Of this the court said:

"It is true that the paving of gutters was within the scope of improvement, but this didn't confer upon the defendant the right to dispense with the charter requirements for competitive bids."

Citing McBrien vs. Grand Rapids, 56 Mich. 95; 22 N. W. 206.

In Clinton Construction Company of California vs. Clay, 34 Cal. App. 525; 168 Pac. 588, the court held:

"A Board of Education cannot contract for work not provided for under original contract exceeding $500.00, without complying with section 130, requiring letting contracts to lowest bidder after public notice."

In L. R. A. (N. S.) vol. 38, p. 660, note 8, is the following:

"Generally public officers have no authority

to make or allow material or substantial changes in any of the terms of the proposed tract after the bids are in. Such a course would prevent real competition and lead to favoritism and fraud."

"The specifications cannot lawfully be altered after the bids have been made without a new advertisement giving all bidders an opportunity to bid under the new conditions. The municipal authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited."

And in such case, where the general public is affected by a violation of a particular statute, or the provisions of any public law, it is not necessarily essential to plead the illegality of a contract constituting such a violation.

Dunham vs. Hastings Pavement Co.,
67 N. Y. S. 632;

Kearns vs. New York, etc., Ferry Co.,
42 N. Y. S. 771;

Dealey vs. San Mateo Land Co.,
130 Pac. 1066-68;

Vol. 19 R. C. L. Par. 352 has the following:

"When a contract is entered into in violation of a positive rule of law intended for the protection of the taxpayers, such as a requirement that contracts of a certain character shall be given to the lowest bidder, or that the incurrence of an obligation of a certain magnitude

shall have the approval of the voters of the municipality, there can be no recovery either upon the contract itself or upon a quantum meruit."

There was no statutory authority for the Board after awarding a contract upon competitive bidding for the building of a bridge at a stated price, to then contract for different construction of the same bridge without competitive bidding, under the guise of "extras." If it should be established in this case that the Board could make so improvident an arrangement, a dangerous power would be placed in its hands. If a Board can do what plaintiff seeks to enforce upon it in this case, it can let a contract for a $10,000.00 bridge, and then, under the subterfuge of "extras," make the same bridge cost $100,000.00.

There were, moreover, many statutory provisions in force in Arizona in 1916, which denied, expressly or impliedly, any such power. Boards of Supervisors exercise inferior and limited jurisdiction. They can do only those things which by express provision or necessary implication, they are permitted to do.

Hammer vs. Smith,
11 Ariz. 420.

County of Santa Cruz vs. Barnes,
9 Ariz. 42.

The Board of Supervisors of a county may make certain contracts for the county, but the county is

the contracting party, and the Board is the mere agency through which the county acts.

Gannon vs. Hohnsen,
14 Ariz. 523.

Where bonds are issued, as is the case here, the board can only proceed as provided by Paragraph 5282:

"If any bonds or other evidences of indebtedness shall be issued and sold by any county, school district, city, town, or other municipal corporation, under the provisions of this chapter, for the purpose of erecting and furnishing any public building within such county, school district, city, town or other municipal corporation, the board of supervisors, in event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this chapter prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said buildings.

"The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said

bids shall be received and opened, and said board of supervisors, city or town council, as the case may be, shall award the contract for the erection and furnishing or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board of supervisors, city or town council, as the case may be."

While this paragraph does not expressly apply to bridges, it is made to do so by the proviso in Paragraph 5285, which is a part of the same chapter as Paragraph 5282.

If it be claimed that the county ratified the alleged agreement, then the authorities are practically universal that the board of supervisors could not ratify a contract which they had no right in

the first instance to make. This is a corrollary to the general proposition set forth above.

Such a contract cannot be ratified. 19 R. C. L. Paragraph 360 reads in part as follows:

> "It is clear that the attempted ratification by a municipal corporation of a contract which it has no power to enter into is ineffectual, and cannot render the contract a binding obligation."

We have confined ourselves in the foregoing discussion strictly to the allegations of the complaint. Taking it all to be true, it is wholly insufficient. The contract sued upon is upon the face of the complaint, a nullity.

II.

THE COMPLAINT DOES NOT SHOW THAT A LEGAL DEMAND WAS FILED AGAINST THE COUNTY.

The Court states the statutory law rather fully on the requirements of such a demand as will give a Board of Supervisors in Arizona jurisdiction, but entirely overlooks the fact that the complaint nowhere alleges that a proper or legal demand was filed; not even by way of legal conclusion. The only allegation respecting the substance of the statement rendered is found in Paragraph VI of the Amended Complaint, as follows:

"That upon completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board

of Supervisors, statement of the amount due him on account of labor and materials performed and (54) supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65."

Tested by any rule, this allegation is insufficient to give the court jurisdiction to enter judgment. It does not state that the statement was either itemized or verified. Considering that only such a demand as the complaint describes was filed, the Board was compelled to and properly did reject it.

In the substitute for Paragraph VI, (Tr. Rec. p 91) the same defects occur. We do not think these fatal omissions in the pleading can possibly have been cured or aided by the general finding of the court, although this is suggested in the last four lines of the opinion, as follows:

"With respect to the itemizing and dates and specifications of the demand, and account presented, the plaintiff in error is concluded by the general finding of the court."

We think the court must for the moment have overlooked the status of the pleading, and was thinking only of the effect of the general finding on issues of fact. We are the more assured of this upon reading the two cases cited in support of the ruling above quoted. Norris vs. Jackson, 9 Wall. 125, does not seem to involve the proposition stated by this court. It does, however, expressly hold

that where a general verdict has been returned, such questions as may arise on the sufficiency of the pleadings may be reviewed.

Nor does the case of City of Cleveland vs. Walsh Cons. Co., 279 Fed. 57, seem to support the holding of this court. It does hold that where there is no written waiver, the review is limited to the primary record. We are not urging a review of issues of fact. We are dwelling on the radical defects in the complaint. Taking it at its strongest, no demand, in legal effect, was ever presented.

A County Board of Supervisors is not bound, nor has it the right to allow a claim against the county, unless all the items of the claim are given.

Paragraph 2434, R. S. A. 1913;

Christie v. Sonoma County, 60 Cal. 164;

Gardner v. Newayago Co., 110 Mich.; 67 N. W. 1091;

Cochise County v. Willcox, 14 Ariz. 234-236-237.

Yavapai County v. O'Neill, 3 Ariz. 363;

Santa Cruz County v. McKnight, 20 Ariz. 103;

Phillips v. County of Graham, 17 Ariz. 208-212-213;

Atchison County v. Tomlinson, 9 Kan. 167;

Ontagamie County v. Town of Greenville, 77 Wis. 165; 45 N. W. 1090;

Uzzell v. Lunney, 104 Pac. 945;

In Cochise County v. Willcox, **supra,** (pp 237-40) the court said:

"The board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued, except as provided in Section 62 of this chapter. . . It follows necessarily that, if the board "must not hear or consider" a demand presented after the period of six months has passed, it has jurisdiction to make no order other than one of rejection or disallowance. In construing a similar statute, the Supreme Court of California said: "Section 40 of the County Government act of 1897 (Stats. 1897, p 470) provides that the Board of Supervisors must not allow any claim in favor of any person against the county unless upon a properly itemized and verified claim 'presented and filed with the Clerk of the Board within a year after the last item of the account or claim is accrued.' The claim of plaintiff was filed and presented more than a year after it accrued and hence the Board not only had no power, but was expressly prohibited from allowing it. It had no power to dispense with the express mandates of the statute. Citing:

Perrin v. Honeycutt,
144 Cal. 87, 77 Pac. 776,

Murphy v. Bondshu,
2 Cal. App. 249, 83 Pac. 278,
Carroll v. Siebenthaler,
37 Cal. 196,
Thoda v. Alameda County,
52 Cal. 350.

"If, therefore, the board cannot even 'hear or consider' a demand not presented within the prescribed period, the limitation in Section 989 (now 2434) is more than a "law of limitation to be made available only when specially pleaded;" it affects not only the remedy, but goes to the very right of the plaintiff to maintain any action whatever."

Clearly the Board has no jurisdiction over a claim unless itemized, and, not having jurisdiction, it can take no favorable action; much less waive the jurisdictional requirement. A Board of Supervisors is of inferior and limited jurisdiction, and nothing is presumed in support of its jurisdiction.

If a claim not properly itemized and verified should be allowed, the allowance is void, and subject to collateral attack.

State v. Goodwin (S. C.)
59 S. E. 35.

In the statement of facts made by the court, we find an error, doubtless due to clerical oversight, that we think should be corrected, as it might mislead the court upon a matter of some importance. At the top of page 2 of the opinion this statement is found:

"Plaintiff alleged that after commencing construction he was advised that $15,000 of an amount appropriated by the Indian Bureau of the United States government would be available, provided certain changes were made in the specifications therefore submitted by plaintiff," etc. The complaint, paragraph IV (Tr. Rec. 74), after alleging that the contract was signed Sept. 5, 1916, goes on to state "that on the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available," etc. The same statement in substance is found in paragraph VII (Tr. Rec. 78), which gives the date of commencing construction as Dec. 26, 1916; and after all changes, etc., had been agreed on. In other words, the Board and plaintiff knew, a month before the contract was signed, that there would be substantial changes in the specifications, owing to the requirements of the Indian Department, and that there would necessarily be an increased cost. Yet, according to the complaint, the Board, without giving any one a chance to bid on the new specifications, and certainly in defiance of the law, permitted the plaintiff to build under the new plan on the "extra" or unit basis. There might have been some justification, morally, though not legally, had the necessity arisen after construction had commenced, but under the circumstances pleaded by plaintiff, there was none.

It is stated in the opinion (page 4) that there was no motion for judgment upon the ground that there was no substantial evidence to sustain a judgment in favor of plaintiff. We beg leave to call the court's attention to the 1st, 2d, 3d and 6th paragraphs of our Motion for Judgment, filed in the trial court at the same time our trial brief was filed, and therefore during the trial, or at least before the case was submitted (Tr. Rec. 102-3). These paragraphs all go expressly to the point that both the pleading and the proof were insufficient to support a cause of action, and consequently insufficient to support a judgment, because of failure to allege or prove the filing of a legal demand, and because of allegation and proof to the effect that the agreement sued upon was ultra vires. If we take out of plaintiff's case the agreement and the claim he presented to the county for payment of what he claimed to be due under said agreement, there is nothing left to support anything. The pleading is so utterly defective as to take both of them out, and the motion for judgment certainly reaches them. It is in effect a demurrer to the evidence as well as to the complaint.

Finally, the circumstances of the case as developed by the pleadings of plaintiff, disclose a claim that is at least extraordinary, and certainly one that justifies careful scrutiny. We doubt if there is any recorded instance of a construction contract, upon which a claim was urged for extras amount-

ing to nearly 60 per cent of the original contract price. The mere statement of such a proposition is sufficient to arouse wonder.

In City of Cleveland vs. Walsh Construction Co., cited by this court in its opinion, Justice Denison says:

> "We are not dealing with a case where there is any suspicion of bad faith or over-reaching nor even where the excess developed above the amount of the certificate is so great as to dominate the original sum. The excess, both as to extras and as to units above the estimate, is relatively small, and is of the character normally incident to every such contract." (279 Fed. 66)

This, we think, emphasizes the illegality of the contract pleaded.

It is also obvious that several points have been overlooked in the development of defendant's case that would have had an important if not controlling bearing on the result. This situation, we ask the court to believe, is due entirely to counsel's unfamiliarity with the rules and procedure in Federal courts, and not to any intention of waiving the points. Because of these oversights the court is restricted to a review of the pleadings. With these circumstances in view, and because the opinion indicates that we failed upon oral argument to adequately present certain points that we have tried

to clarify in this motion, we respectfully offer this petition for a rehearing.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

Phoenix, Arizona,
May 2, 1925.

The undersigned, counsel for plaintiff in error herein, hereby certify that in their judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

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